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MICHAEL RODAK,

IN THE

Supreme Court of the United States

No. 74-934

STATE OF NEW YORK,

Respondent,

-against-

ANTHONY HUESTON, also known as TONY DE JEST and BONNIE KERR,

Petitioners.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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§ 460.20, New York Criminal Procedures Law	1

REPLY BRIEF

Respondent has adopted conflicting theories in their attempt to defeat the petition for a writ of certiorari. They state on the one hand that the petition is too late, claiming the 90-day period has run, and on the other hand that it is too early, claiming that petitioners have not exhausted their state remedies. In both instances they are wrong.

POINT I

Respondents claim that petitioner's motion for a certificate for leave to further appeal to the Court of Appeals was a "vain act" may, with their "20-20 hindsight", be correct. It may also be correct that this petition could have been brought immediately after the decision of May 2, 1974 of the Court of Appeals because petitioners would not have been required to do a "vain act" in order to exhaust their state remedies. Nevertheless, the fact that *the petitioners* need not do what *the petitioners* can prove is a "vain act" is not the same as prohibiting them from doing what may later turn out to have been in vain. Petitioners had the right under § 460.20 of the New York Criminal Procedures Law to make the motion in the Court of Appeals. The Court of Appeals wasn't being asked to determine the facts but to determine the legal effects of the facts. This they had the power to do; and, indeed the Court of Appeals has in many instances reconsidered their interpretation of the law and reversed themselves. In fact, in *Dow v. Lorrenzo*, 18 N.Y. 2d 612, 272 N.Y.S. 2d 382, 18 N.Y. 2d 853, 275 N.Y.S. 2d 856, on a motion to reargue, the Court of Appeals unanimously reversed their previous unanimous decision.

Consequently, this petition is timely.

POINT II

In Respondent's effort to prevent a hearing on the merits of the complex issues raised in the petition herein, they are willing even to distort the facts. Respondents know full well that from 1969 until November of 1974 one attorney represented both defendants, i.e., GEORGE BELLANTONI, the attorney who now only represents defendant HUESTON in this petition. There was no "piecemeal approach adopted by Petitioners". Rather, when both petitioners were represented by one attorney, the thrust of the appeals, to the exclusion of all other issues, was that the fruits of an eavesdropping warrant should be suppressed where the eavesdropping warrant contains a provision expressly waiving notice to the persons named in the warrant, contrary to the provisions of State and Federal statutes. *All State appeals have been exhausted with reference to this point.* If a petition had not been made within 90 days (as belabored by Respondent in his Point I) the petitioners would now be foreclosed to raise the serious questions contained in the petition. However, when defendant KERR retained new counsel in November 1974 she discovered that there were other issues. These issues are now the subject of an appeal to the Appellate Division from a decision and order of the County Court, Rockland County, of January 6, 1975 in which not only did the Court state that "there was error regarding the admission of certain evidence which * * * might constitute reversible error" but also found that:

> "It would also appear that the record on trial was never reviewed on appeal due to the fact that the appeal was taken only from the pretrial decisions of this Court which denied the defendants' motions to suppress evidence obtained from intercepted telephonic communications and

a subsequently issued search warrant based on information obtained from these intercepted communications. Accordingly, the appellate courts were never afforded the opportunity of reviewing the record on trial to discover possible errors therein."

These matters, now before the New York Courts, are not, however, the subject of the petition herein nor can they be. The reasons why they were not previously raised is a question now before the New York Courts. The subject matter of this petition, however, was raised and must be heard now or not at all. Unless the petition herein is granted, a "Catch 22" situation will result. And, a "Catch 22" situation is exactly what Respondent attempts here to create so that the issues raised by the direct conflict between the decisions of the Third Circuit Court of Appeals and the New York State Court of Appeals will not be resolved. Respondents prefer that the question not be resolved at all rather than risk an adverse decision — . Why?

POINT III

Respondent's "Point III" supplies the answer to the question "Why?". The Respondent makes the accusation that to accept the "harsh construction" of the decision of the Third Circuit Court of Appeals (Appendix C) would attribute to a late and learned Justice of the New York Supreme Court "an utter disregard of the statutes in effect at the time." Such utter disregard was not attributed by Petitioners to Justice Hoyt. Did Justice Hoyt or his Clerk or law secretary prepare the orders? Of course not. The Respondent knew full well who prepared the orders authorizing eavesdropping warrants and to whom is attributed not only an utter disregard for the law but a calculated attempt to circumvent the law in which,

unfortunately, the late Justice Hoyt concurred. The petition specifically states in the reasons given for granting the writ that:

> "Prosecutorial officers must adhere to the statute to safeguard individuals privacy as must the courts. The joining of the Court with the prosecutor to circumvent the statute should not be permitted else other overzealous officials be encouraged not only to continue this type of circumvention but find other and different ways to circumvent the statutes."

Respondent also claims that the point that the Youman's warrant similarly circumvented the law and thus tainted the warrant herein was "injected into the case for the first time" in the instant petition, despite the fact that the point was raised not only in both the Appellate Division and Court of Appeals in New York but was also raised in the Pennsylvania case both in the Court of Appeals for the Third Circuit and the District Court.

The balance of Respondents' "Point III" and their "Point IV" attempts to convince this Court of the merits of their position. They should be granted an opportunity to do so. The granting of this petition would avail them of this opportunity.

Respectfully submitted,

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